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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLAM L. HAMLING, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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Interest of *Amici Curiae**

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members engaged solely in the defense of those principles embodied in the Bill of Rights. The American Civil Liberties Union of Southern California is an affiliate of the American Civil Liberties Union and functions within Southern California where this case arose. During its fifty-four year existence, the ACLU has primarily been concerned with protecting the First Amendment guarantees of freedom of speech and press. Our original concern was with direct governmental efforts to restrict political expression. But it has been our experi-

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*Letters of consent from counsel for the petitioners and the United States have been filed with the Clerk of the Court.

ence that when any form of speech or writing, such as "obscenity", is declared to be beyond the bounds of constitutional protection, such exceptions are employed to suppress political expression. Similarly, the exclusion of any category of expression from general First Amendment protection erodes the safeguards for speech which is protected.

Because of these concerns, we have participated in many of this Court's decisions dealing with obscenity issues. We filed amicus curiae briefs in connection with three of the cases decided by the Court on June 21, 1973. In those briefs we suggested that neither the doctrinal nor the empirical case for excluding this particular category of expression from constitutional protection had ever been made. We still hold to that view.

But even assuming the soundness of the Court's rulings that material categorized as obscene may be systematically prohibited, controlled and regulated, this case presents important issues concerning the propriety of the exercise of federal power to accomplish such control, the method by which that power is exercised, and the due process violations inherent in applying standards enunciated in 1973 to punish conduct engaged in prior to that time.

The specific issues in this case involve the proper application of the federal statute prohibiting the mailing of obscene material in general, and particularly in light of last Term's rulings. The purpose of this brief is to suggest to the Court the larger context in which these issues must be decided.

Summary of Argument

This Court's decisions in *Miller* v. *California*, 413 U.S. 15 (1973) and *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), reaffirming the doctrine that obscenity may be systematically proscribed by the state, rest upon analytic premises which have been eroded and an inadequate demonstration of social harm. The proper way out of the "intractable obscenity problem" was charted in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), that is, the application of a traditional First Amendment approach to obscenity, focusing on the context, not the content, of the communication and assessing the governmental interests involved in the particular situation.

Notwithstanding the Court's assurances, last Term's obscenity decisions will not be limited to the prohibition of hard-core pornography, especially since one of the Court's avowed purposes was to facilitate prosecution of obscene material. The power to suppress materials with a sexual content has historically been used as a pretext to censor publications because of their political or social commentary. In this century alone, the existence of sexual content has been used as the predicate for banning the works of authors such as James Joyce, Theodore Dreiser, Erskine Caldwell, Edmund Wilson, Sinclair Lewis and Ernest Hemingway. More recently, dissident expression of opinion has been punished because it was assertedly obscene. See, *e.g.*, *Kois* v. *Wisconsin*, 408 U.S. 229 (1972). Events since last June have done nothing to dispute the prediction that the Court's rulings will fuel the forces of repression and censorship.

Even if obscenity can continue to be banned systematically, the case for the exercise of federal power in this area has never adequately been made, and the argument that federal interests in this area are attenuated, see *Roth* v. *United States*, 354 U.S. 476, 504-05 (1957) (dissenting opinion of Justice Harlan), has not been answered. The federal postal power cannot be used as the predicate for censorship of obscenity. See, *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969). And the federal government has no identifiable substantive power over the kinds of interests which in *Paris Adult Theatre I* were held to justify comprehensive state regulation.

Finally, even if federal power over obscenity is recognized, such power should not be exercised through a statute as vague as Section 1461. Vague laws regulating expression violate First Amendment interests and the due process "principle of legality." *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Levy* v. *Parker*, 478 F.2d 772 (3rd Cir. 1973); *prob. juris. noted*, 42 U.S. Law Week 3155 (Sept. 25, 1973). Though *Roth* upheld this statute against a vagueness challenge, the *Miller* decision requires the kind of specificity which this statute lacks. And even if it can be "authoritatively construed" to embody the *Miller* requirements, such construction should not be retroactively applied to these petitioners.

I.

The continued exclusion of obscenity from the protection of the First Amendment is unjustified.

The path of this Court's obscenity jurisprudence, from *Roth* v. *United States*, 354 U.S. 476 (1957) to *Miller* v. *California*, 413 U.S. 15 (1973) and *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), has been traced many times and needs little elaboration. In *Roth*, addressing the question for the first time, the Court held that "obscenity is not within the area of constitutionally protected speech or press." 354 U.S. at 485. The bases for the ruling were dicta in earlier cases, some scanty evidence that obscenity had been banned in colonial times, and the almost universal prohibition of obscenity in contemporary times. The analytical theory of the decision was that certain categories of utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." 354 U.S. at 485 (quoting from *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, obscenity joined other kinds of utterances—most notably "fighting words" and "libel"—as somehow beyond the constitutional pale. As a consequence of applying this "two-level" theory of the First Amendment, the *Roth* Court did not have to undertake the task of carefully analyzing the precise societal interests advanced by the proscription of obscenity. Indeed, "[c]ommentators have suggested that the two-level theory was used in *Roth* because it was unlikely that the Court would have been able to marshal evidence that the consequences of obscenity, in terms of antisocial con-

duct or more general injury to society, were so imminent or significant as to support proscription under any previous formula used to justify regulation of protected speech." *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 1, 162-63, n. 19.

In the years since *Roth,* the doctrinal underpinnings of the decision have been seriously eroded. In *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court rejected the doctrine that once an utterance can be categorized as "libel", it is then stripped of all First Amendment protection. See also, *Gooding* v. *Wilson,* 405 U.S. 518 (1972) (fighting words doctrine). And, in general, this Court has disapproved efforts to exclude categories of speech from the protection of the First Amendment by attaching labels to the kind of expression involved. See, *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963); *cf. Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973).

Similarly, in the years between *Roth* and *Miller,* the Court's efforts were devoted not to an examination of the interests supporting obscenity laws, but to elaborating and applying the constitutional definition of obscenity and spelling out the procedural safeguards which had to be employed in the course of determining on which side of the constitutional line the particular magazine, book or film would be placed. And, of course, the consequence of the two-level approach to obscenity was that each determination in each case presented the constitutional issue whether the categorization, and thereby the denial of constitutional protection, was valid. For although on one side of the line there was prohibitable obscenity, on the other side was protected expression, buttressed by all the accepted First

Amendment values designed to maximize the flow and scope of information and discussion. See, *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940); *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). Thus, the "intractable obscenity problem" persisted, and the variety of positions taken by Justices of this court proliferated. See, *Interstate Circuit, Ltd.* v. *Dallas,* 390 U.S. 676, 704-08 (1968) (Harlan, J. dissenting).

For a while it appeared that a majority of the Court would break out of the pattern by moving away from the focus on content toward a traditional First Amendment inquiry into the context and manner in which the material is presented. Such an analysis would assess whether the communication of the material—even though obscene—could be found to trench upon presumably valid state interests, such as prohibiting the pandering of obscene materials, protecting minors, or guarding the rights of adults who would not wish exposure to such communications. See, *Redrup* v. *New York,* 386 U.S. 767 (1967). Such an approach contained two important benefits. First, it could bring familiar, traditional First Amendment analysis to the obscenity area; second, it would ease the pressures on this and lower courts by reducing the number of cases when the issue of obscenity *vel non* would have to be addressed.

The apex of this approach was *Stanley* v. *Georgia,* 394 U.S. 557 (1969), where the Court held that a statute punishing "mere private possession of obscene matter violates the First Amendment." *Id.* at 559. While the setting of *Stanley* was the privacy of the home, the *ratio decidendi* of the decision was anchored in the interests protected by freedom of expression. Equally important, in rejecting Georgia's arguments that it possessed constitutional power

to ban the mere possession of obscene materials, the Court explicitly overruled some of the primary arguments traditionally offered to sustain obscenity laws. To the argument that there is state power "to protect the individual's mind from the effects of obscenity," the Court responded that such sway over the "moral content of a person's thoughts" is "wholly inconsistent with the philosophy of the First Amendment." 394 U.S. at 565-566. As to the claim that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence," the Court found "little empirical basis," *id.* at 566, for the assertion and no legal justification for suppressing ideas because they may lead to harmful conduct. Finally, a ban on private possession could not be supported as an aid to enforcement of prohibitions against distribution.

By holding that obscene material was nevertheless entitled to some constitutional protection, and in rejecting certain of the primary rationales for obscenity statutes, the *Stanley* decision contained the potential for redirecting the focus of this Court's doctrine in this area. And, indeed, many lower courts read *Stanley* as having written "a new chapter" in obscenity law, one requiring attention to the government interests implicated in the particular prohibition. See, e.g., *United States* v. *Dellapia*, 433 F.2d 1252 (2d Cir. 1970). In *Dellapia*, the federal statute involved here, 18 U.S.C. §1461, was utilized to prosecute the private mailing of obscene films. Finding that the defendants' conduct infringed no interest which justified governmental regulation, the Second Circuit, in an opinion by Chief Judge Irving Kaufman, reversed the conviction: "It would be anomalous to prevent consenting adults from freely passing among themselves obscene material which *Stanley* tells

us each of them was entitled to possess and view or read." *Id.* at 1258. Similarly, in *United States* v. *Various Articles of "Obscene" Merchandise,* 315 F. Supp. 191 (S.D.N.Y. 1970) (three-judge court), *prob. juris. noted,* 402 U.S. 971, *app. dismissed,* per Rule 60, 403 U.S. 942 (1971), invalidating the federal ban on importing obscene materials as applied to a person importing single items for his own use, Circuit Judge Moore concluded that "orthodox First Amendment considerations are once again of paramount importance, *Roth* notwithstanding, even where the publications in issue are concededly obscene." *Id.* at 195. See also, *Stein* v. *Batchelor,* 300 F. Supp. 602 (N.D. Tex. 1969) (three-judge court), *vacated on other grounds, sub nom., Dyson* v. *Stein,* 401 U.S. 200 (1971); *Karalexis* v. *Byrne,* 306 F. Supp. 1363 (D. Mass. 1969), *vacated on other grounds,* 401 U.S. 216 (1971).

But these stirrings of a new, sound approach to the problem, one which would recognize valid governmental interests while accommodating traditional First Amendment concerns, were short-lived. In 1971, with a change in the composition of the Court, the reach of *Stanley* began to be limited. See, *United States* v. *Reidel,* 402 U.S. 351 (1971); *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971). And with *Miller* and *Paris Adult Theatre I,* a majority of the court delivered the *coup de grace* to whatever potential remained to utilize *Stanley* as a sound route away from the "intractable obscenity problem." With these two cases the Court has, with some adjustments and troubling implications, retreated back to the regime of *Roth.*

The obvious question is why? Why, when the doctrinal premise of *Roth*—that certain categories of expression are really not expression—is far weaker than it was 15 years

ago, has the Court reaffirmed the two-level theory of obscenity. And why, in the absence of any intervening, systematic showing that exposure to obscenity is socially harmful, has harm once again simply been assumed.

In *Paris Adult Theatre I*, the majority attempted to answer these questions by identifying the state interests which obscenity regulation fosters. Relying on a minority report of the Commission on Obscenity and Pornography, and on commentators who generally support strong social controls, the majority found "at least an arguable correlation between obscene material and crime," 413 U.S. at 58, or at least that a legislature "could quite reasonably determine that such a connection does or might exist." *Id.* at 61. Not only did *Stanley* conclude that such connections had not been shown, but, in general, where First Amendment rights are potentially involved, the Court has required a much more substantial demonstration that the prohibition rests on firm, indeed compelling, legislative premises—not merely the possibility of a speculative connection between the speech to be prohibited and the social danger to be averted. See, *Dennis* v. *United States*, 341 U.S. 494, 505-08 (1951); *Communist Party* v. *S.A.C.B.*, 367 U.S. 1, 90-93 (1961). Similarly, there has been no persuasive showing that the concern with protecting children or non-consenting adults could not be met in ways short of continued, total prohibition of obscenity outside of the home. Finally, and most ominously, the Court indicated that obscenity legislation could validly be premised on concern for the quality and tone of life, particularly in urban areas, as part of the general governmental power to protect "the social interest in order and morality." 413 U.S. at 61. One would have thought that morality is too gossamer, let alone danger-

ous a basis for regulation in the First Amendment area. See, *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959). Many individuals in our society ardently believe, whether rightly or wrongly, that the mere awareness of the general availability of abortion demeans the quality and tone of life; yet such beliefs—embodied in legislation—were held insufficient to justify the systematic prohibition of abortions for those women who wish to have them. *Roe* v. *Wade*, 410 U.S. 113 (1973). Why should the availability of obscene materials and books to those who wish exposure to them be treated any differently? If a legislature's determination that certain forms or modes of expression adversely affect the quality or tone of life can serve as a valid predicate for regulation or prohibition of that expression, it is difficult to see how the line can be drawn at hard-core pornography.

II.

The authority to prohibit obscene materials will be used to suppress protected expression.

In the decisions last Term, the Court attempted to assure its critics that the re-affirmation of systematic state power to proscribe obscene materials would not result in a fresh wave of repression of ideas worthy of expression. *Miller* v. *California, supra*, 413 U.S. at 34-36. Repression would be limited to the area of hard-core pornography. Enforcement of such limits would be insured by confining "the permissible scope of such regulation to works which depict or describe sexual conduct," and by requiring that such conduct "be specifically defined by the applicable state law, as written or authoritatively construed." *Id.* at 24. But

specifying the kind of sexual conduct which will trigger suppression of a book or movie is no guarantee that only hard-core pornography will be proscribed. See, *United States* v. *35 MM Film Entitled "Language of Love,"* 432 F.2d 705, 715-16 (2d Cir. 1970).

More importantly, the net effect of the Court's rulings was to make censorship easier, not harder, than it was before. Indeed, the explicit purpose of replacing the "utterly without redeeming social value" test with the more relaxed showing that a work "lacks serious literary, artistic, political, or scientific value" was to facilitate the task of the prosecutor. Similarly, the rejection of a national standard of offensiveness and prurience in favor of hypothetical state (or perhaps even local, see *Price* v. *Commonwealth*, —— Va. ——, 14 Cr. L. Rep. 2379 (Va. Sup. Ct., Jan. 14, 1974)) standards of taste and decency will further expedite prosecution by allowing a kind of "local option" on the First Amendment. Nor need the authorities attempt to produce expert testimony that the material in question is obscene. *Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 56.

Between the lines of these rulings law enforcement officials can read the clear signal: a majority of this Court has found its way out of the intractable obscenity problem by retreating from the concept that each obscenity case is at the same time a First Amendment case. Instead, deference will be paid to local standards and local fact-finding, with the implication that the conclusions reached by state tribunals will be insulated from federal review, and the conclusions of federal tribunals will not necessarily prompt this Court's review.

That this new approach has prompted "a great deal of hand wringing by concerned libertarians," *People* v. *Heller*, —— N.Y.2d —— (1973) is perfectly understandable. Civil libertarians are always concerned about the ease with which any grant of censorship powers degenerates into a general warrant for repression of ideas. The majority express confidence that its reaffirmation of the power to suppress hard core pornography will be confined to such materials. But, historically, the pressures toward general censorship of disagreeable and dissident expression are hydraulic even under the best of circumstances. The power to ban the obscene has inevitably exceeded the purposes for which the power has been granted.

Let us again remind the Court of the works which have been banned on the basis of *sexual content*. This history has been told in the pages of judicial decisions as well as in special studies on the problem. See Haight, BANNED BOOKS (3d Edit. R. R. Bowker Co. 1970); T. Emerson, *The System of Freedom of Expression* (1970), pp. 468-70. The list of authors whose works have been censored reads like a "Who's Who" of classic literature:

—James Joyce (*United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934));

—Theodore Dreiser (*Commonwealth* v. *Friede*, 271 Mass. 318, 171 N.E. 472 (1930)) ("An American Tragedy");

—Erskine Caldwell (*Attorney General* v. *Book Named "God's Little Acre"*, 326 Mass. 281, 93 N.E.2d 819 (1950));

—Edmund Wilson (*Doubleday and Co.* v. *New York*, 335 U.S. 848 (1948)) ("Memoirs of Hecate County");

—Voltaire ("Candide", see *Banned Books, supra,* p. 33);

—Walt Whitman ("Leaves of Grass", see *Banned Books,* p. 53);

—Sinclair Lewis ("Elmer Gantry", see *Banned Books,* p. 80);

—Henry Miller (*Besig* v. *United States,* 208 F.2d 142 (9th Cir. 1953)) ("Tropic of Cancer", "Tropic of Capricorn");

—Ernest Hemingway ("A Farewell to Arms", "The Sun Also Rises", "To Have and Have Not", "For Whom the Bell Tolls", see *Banned Books,* pp. 90-91);

—Erich Maria Remarque ("All Quiet on the Western Front", see *Banned Books,* p. 92);

—John Steinbeck ("Grapes of Wrath", see *Banned Books,* p. 93).

As this list indicates, many of these works were banned because of their political content, not their sexual explicitness; the presence of the latter simply served as the formal justification for the suppression of the former. That is how the censor works. His agenda usually contain material whose sexual content is incidental or ancillary to the primary purpose of expressing views which are dissident, satirical, irreverent, sacrilegious or profane. The presence of sexual content is used as the pretext for suppressing works because of the ideas they contain, ideas completely divorced from the pornographic.

Indeed this Court is familiar with recent examples of this phenomenon.

In *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (per curiam), the petitioner, the publisher of an underground newspaper called "Kaleidoscope," was convicted under a state obscenity statute and sentenced to two years in prison. The crimes involved were publishing two photographs of a nude couple embracing, and publishing a "Sex Poem." This Court granted certiorari, determined that the items were not obscene, and reversed the convictions. How would that case have been decided under the new standards? Equally important, will this Court be able to review all such convictions to assure that its recent decisions are applied only to hard-core pornography?

In *Dyson* v. *Stein, supra,* police raids were directed at the publisher of Dallas Notes, another underground newspaper, effectively putting it out of business. The predicate for the raids was a search warrant authorizing the seizure of "obscene articles and materials." Will the Court's obscenity rulings deter such practices or encourage them?

In *Papish* v. *University of Missouri Board of Curators*, 410 U.S. 667 (1973), the petitioner had been expelled from a state university for distributing a newspaper containing "forms of indecent speech," particularly a cartoon depicting a rape of the Statue of Liberty by police, and a headline containing a well-known "twelve-letter" word. The District Court held that the two items were obscene; the Eighth Circuit affirmed on the theory that the petitioner could be expelled regardless of whether the items were obscene. A majority of this Court held that the cartoon and headline could not be found obscene. There were two dissents, both premised on the concept that university power

to suppress "obscene and infantile" expression was greater than state power to prosecute for distribution of the same material. If the petitioner distributed the identical newspaper today, on or off the campus, is it clear that punishment or prosecution could not validly go forward under the Court's recent rulings?[1]

In numerous cities, distributors of underground newspapers containing political criticism and satire have been subjected to arrests and harassment, usually because the publications contained some sexual material claimed by police to be obscene. See, e.g., *Washington Free Community* v. *State's Attorney*, 300 F. Supp. 487 (D. Md. 1969); *Great Speckled Bird of Atlanta* v. *Stynchcombe*, 298 F. Supp. 1291 (N.D. Ga. 1970); *United States* v. *Head*, 317 F. Supp. 1138 (E.D. La. 1970); *Henley* v. *Wise*, 303 F. Supp. 62 (N.D. Ind. 1969); *Kois* v. *Breier*, 312 F. Supp. 19 (E.D. Wis. 1970). In various cities, the producers of "Hair," an

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[1] Indeed, on many campuses school officials have consistently attempted to invoke obscenity rules to punish faculty or students for distributing or seeking access to materials which in no legitimate way could be characterized as "obscene." For example, in New York, school officials removed from a school library a book describing ghetto life, entitled "Down These Mean Streets," in part because of complaints that it contained "obscenities and explicit sexual interludes." *Pres. Council, Dist. 25* v. *Community School Board, District 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). In Ohio, one school district banned "Catch 22" by Joseph Heller and "Cat's Cradle" by Kurt Vonnegut, Jr.; another razored out pages from the "Spoon River Anthology." In Alabama, a teacher was dismissed for assigning another Vonnegut story, "Welcome to the Monkey House," in part because it advocated "free sex." Litigation was necessary to declare that the work was not obscene and secure the teacher's reinstatement. *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). Such examples are merely illustrative. In all of them, the existence of any sexual content at all provided the major premise for the censor's actions.

award-winning musical that successfully ran on Broadway for years, have had to go to court to secure the right to perform their satirical show because it contained brief episodes of nudity. See *Southeastern Promotions, Ltd.* v. *City of Atlanta,* 334 F. Supp. 634 (N.D. Ga. 1971) (and cases cited therein); *Southeastern Promotions, Ltd.* v. *Conrad,* 486 F.2d 894 (6th Cir. 1973), *cert. granted,* 42 U.S. Law Week 3388 (Jan. 8, 1974).

And so it goes. The common element in all these cases is the use of obscenity statutes as a vehicle for attempts to suppress political or social commentary. This process occurred during the regime of *Redrup* v. *New York,* 386 U.S. 767 (1967), when very little was thought validly to come within the reach of obscenity laws. The effect of this Court's recent rulings—particularly the reference to local standards of taste in such matters—can only be to accelerate this process.

Events since June 21, 1973 have done nothing to dispel these fears. To the contrary, in the months following this Court's rulings a wave of censorship has swept across this Nation, encompassing material admittedly with a sexual content but which in no way could be characterized as hard-core pornography.[2] In its wake, vendors of "girlie" maga-

[2] The publishers of Playboy Magazine have supplied to *amici curiae* incident reports submitted by retailers and wholesalers of Playboy, Oui, Penthouse and similar publications. Those reports demonstrate two distinct patterns resulting from the Court's rulings: (1) harassment by public officials and (2) self-censorship by distributors.

Thus, for example, in Ashland, Ohio, the owners of a candy store were arrested and ten boxes of magazines, including Playboy, were seized. In Greenville, Mississippi, Playboy and similar magazines were confiscated from a supermarket and the distributors were threatened with a fine. In Mason, Georgia, magazines similar to

zines have been harassed, school teachers have been punished for assigning the works of writers such as Kurt Vonnegut, Jr. (whose books were burned in North Dakota), the distributors of critically acclaimed movies have been threatened with prosecution, see, *United Artists Corp.* v. *Proskin*, 363 F. Supp. 406 (N.D. N.Y. 1973) (three-judge court) ("Last Tango in Paris").[3] Worst of all, the Court's decisions have had a demonstrable deterrent effect on the creative community responsible for our contemporary books and movies.

Despite the assurances given last Term, the effect of the Court's decisions has been to exacerbate the problems of censorship and fuel the forces of repression which have always lurked beneath the surface of American life. The certain way to reverse the trend is to reconsider the premises of those decisions and return to the path charted in *Stanley*.

Playboy were confiscated and court proceedings were commenced. In Shreveport and Jackson, Mississippi, public officials ordered such magazines off the newsstands. Similar orders were given to newsstand owners in Hopeville, Virginia, Steubenville, Ohio, and Atlanta, Georgia.

Far worse than these episodes of official harassment are instances of self-censorship where distributors have unilaterally determined to discontinue handling such magazines. For example, in Southern California, a major supermarket chain has stopped selling Playboy. The same thing has occurred in Boise, Idaho. A major drug store chain in Baltimore, Maryland has taken similar action. And in Cleveland, Ohio, the operators of a chain of drug stores have asked to see advance copies of each issue so that they can decide whether to sell Playboy in their various stores.

[3] All these various episodes are detailed in the *amicus curiae* brief of the Association of American Publishers in *Jenkins* v. *Georgia*, O.T. 1973, No. 73-557, at pp. 10-17.

III.

The federal postal power should not be utilized as the predicate for censorship of obscenity.

Up to now, the discussion has focused on whether this Court should continue to allow systematic government censorship of obscenity and what the consequences of such censorship have been and will continue to be. But this case has a special dimension, for it involves not the States' claimed power to regulate the quality and tone of life, but the federal government's attenuated power to deal with obscenity by use of its authority over the mails.

In *Roth* v. *United States, supra,* the majority opinion dealt with this issue perfunctorily, reasoning that since ". . . obscenity is not expression protected by the First Amendment. . . . the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, §8, cl. 7." 354 U.S. at 492-93 (footnotes omitted). In reaching this conclusion, reliance was placed on the "hoary dogma . . . that the use of the mails is a privilege on which the Government may impose such conditions as it chooses," a doctrine which "has long since evaporated." 354 U.S. at 504, n. 5 (dissenting opinion of Justice Harlan). As Justice Holmes said in his famous dissent: "[t]he United States may give up the post office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U.S. 407, 437 (1921). And cases since *Roth* have made

it clear that the Congress cannot use its controls over an otherwise neutral conduit to create or enhance the federal government's substantive censorship powers. See, *Lamont* v. *Postmaster General*, 381 U.S. 301, 305 (1965); *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969); cf. *United States* v. *18 Packages of Magazines*, 238 F. Supp. 846, 848 (N.D. Cal. 1964).

The existence of any substantive federal power to regulate obscenity is similarly questionable. The theory was developed by Justice Harlan in *Roth*:

> But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.
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> Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. 354 U.S. at 504-05.

Since then, in none of the cases involving Section 1461 has this Court responded to Justice Harlan's argument. See, *Ginzburg* v. *United States*, 383 U.S. 463 (1966); *United States* v. *Reidel*, 402 U.S. 351 (1971); cf. *United States* v.

Orito, 413 U.S. 139 (1973) (involving Section 1462).[4] For example, the analogous power to control interstate commerce, upheld in *Orito* as the basis for regulating shipment of obscene materials across state lines, has its limitations. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336 (1971); see also, *United States* v. *Maze*, —— U.S. ——, 42 U.S. Law Week 4113 (Jan. 8, 1974) (mail fraud). Presumably an *intra*state shipment of obscene materials by private carriage could not be reached by 18 U.S.C. Section 1462. By the same reasoning, what possible federal interests—other than the secondary ones identified by Justice Harlan—would justify penalizing the intrastate mailing of the same material?

Lower federal courts have also balked at the concept of employing the postal power as the basis for plenary federal control over obscene materials. For example, in *United States* v. *Dellapia, supra*, the Second Circuit construed the mail statute's "broad prohibition as subject to an underlying requirement that the mailing trespass upon a valid governmental which constitutionally justifies invasion of a private consensual relationship . . . ." 433 F.2d at 1260. And even the Government, perhaps in recognition of the attenuated federal interest in regulating obscenity, at one point announced a policy of not enforcing the statute to prosecute the private mailing of obscene correspondence. See *Redmond* v. *United States*, 384 U.S. 264 (1966) (per curiam); *Cox* v. *United States*, 370 F.2d 563 (9th Cir. 1967); cf. *United States* v. *Watson*, 293 F. Supp. 694 (W.D. Mo. 1968).

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[4] Justice Harlan did concede "a limited [federal] interest" in excluding hard-core pornography from the mails. *Memoirs* v. *Massachusetts*, 383 U.S. 413, 457 (1966) (dissenting opinion). But even he was only able to identify the interest in terms of the possible thwarting of state regulation if the mails were used to distribute such materials. *Id.* at 457, n.2.

Finally, the assertion of federal power to censor obscenity involves a very real doctrinal and practical dilemma.

On the one hand, it appears settled that in enforcing Section 1461's ban on mailing obscene materials, a national standard of decency must be employed to assess the offensiveness of the challenged subject-matter:

> There must first be decided the relevant "community" in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. *Manual Enterprises* v. *Day*, 370 U.S. 478, 488 (1962).

As the First Circuit recently pointed out, requiring anything less than national standards under Section 1461 would allow intolerable leeway for forum-shopping and selective prosecution:

> Since the statute proscribes the deposit for mailing, conveying in the mails, and delivery of obscene materials, were a state standard to govern the level of tolerance, guilt or innocence could easily turn on the choice to prosecute in the state of mailing, the state of delivery, or a state through which the material passed. This would open the possibility of senders of identical materials from the same state to be found guilty or not, depending on the course of transit or state of delivery of their materials. The vice of selective prosecution would also be present, as well as the anomalous situation of having prosecution under a national law depend

upon the laws of the least permissive states. *United States* v. *Palladino*, —— F.2d ——, 14 Cr. L. Rep. 2354, 2355 (1st Cir. 1974).

On the other hand, *Miller* v. *California* held not only that "national" standards were not required in State proceedings, but that such standards were "abstract", "hypothetical", "unascertainable." Thus, while national standards should be applied under the federal statutes to avoid all the constitutional problems identified in *Manual Enterprises* and *Palladino*, the majority of this Court has indicated that such standards are too speculative to be applied in State proceedings. The "unascertainable" nature of national standards would render any prosecution under them a violation of due process requirements. See *Winters* v. *New York*, 333 U.S. 507 (1948); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926). And the utilization of less than a national standard, under this federal statute, would have an enormously inhibiting effect on those who use the mails to transmit books, magazines, or films with a sexual content. Editors will spend more time worrying about postal routes than about literary quality.

Since the primary interests purportedly advanced by the regulation of obscenity are state, not federal, see *Paris Adult Theatre I* v. *Slaton*, *supra*, the existence of such a constitutional dilemma is particularly intolerable.

IV.

Section 1461 is prohibitively vague, and its continued enforcement violates several fundamental constitutional principles.

Even assuming that hard-core pornography can continue to be prohibited systematically through the use of the federal postal power, the use of Section 1461 to accomplish such prohibition and its application in this case offend a number of constitutional safeguards.

Section 1461 proscribes the mailing of every "obscene, lewd, lascivious, indecent, filthy or vile" matter. As written, it embodies the three major evils of vague enactments which this Court has identified:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens

> to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972) (footnotes omitted).

See also, *Winters* v. *New York,* 333 U.S. 507 (1948); *Burstyn* v. *Wilson,* 343 U.S. 495 (1952); *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U.S. 684 (1959). From a First Amendment perspective, vague laws are condemned because they have the effect of deterring protected expression. Equally important, in a due process sense, vague laws violate the "principle of legality" common to all civilized nations. *Levy* v. *Parker,* 478 F.2d 772, 791 (3rd Cir. 1973), *prob. juris. noted,* 42 U.S. Law Week 3155 (Sept. 25, 1973). As Justice White has observed,

> . . . our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. *Linda R.S.* v. *Richard D.,* —— U.S. ——, 35 L.Ed.2d 536, 543 (1973) (dissenting opinion).

The prohibitions in Section 1461 are not "plainly and explicitly worded so that people will know what they mean," and the contrary claim has never seriously been made. Indeed, in *Roth,* where the vagueness challenge was rejected in passing, the majority admitted that the terms of the statute were "not precise." 354 U.S. at 491. Instead, the Court held that the statutory terms, "applied according to the proper standard for judging obscenity, already

discussed, give adequate warning of the conduct proscribed. . . ." *Ibid.* In other words, the requisite specificity of what is "obscene" can be supplied by judicial construction—a position since abandoned by the author of the *Roth* opinion. And even in *Miller* the majority implied that words such as "obscene" could not meet constitutional muster in the absence of legislative specification or judicial construction. But, as this Court has noted,

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large. *United States* v. *Reese*, 92 U.S. 214, 221 (1876). See also, *United States* v. *Robel*, 389 U.S. 258, 275-76 (1967).

Thus, once a statute must depend on judicial construction to remedy its vagueness, its capacity to provide the requisite notice is seriously diminished. And its application tends to become an ad hoc matter devolving upon the attitude of judges, juries, and administrative agencies. The Government should not continue to be allowed to use this facially vague statute to regulate in the First Amendment area.

Since the statute requires judicial construction to save its validity, the question is whether it can bear a construction consonant with the new requirements stated in *Miller* v. *California*.[5] Perhaps the most "obscene" phenomenon

[5] Even assuming that this statute or any other were re-drawn to embody the central elements of the *Miller* holding, it is still doubtful that constitutional standards of specificity would be met. See, *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 78 (dissenting opinion of Justice Brennan). While the kinds of sexual conduct whose

since last June has been the way that some courts have rushed to "construe" their statutes to incorporate the central elements of the *Miller* decision, holding that no matter what the particular statute said or what its authors intended, the new definitions could be read into the enactments. See, *e.g.*, *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049 (Sup. Ct. Wash. 1973); *Grigsby* v. *State*, 14 Cr. L. Rep. 2143 (Tenn. Sup. Ct. 1973); *People* v. *Heller*, —— N.Y.2d —— (Dec. 28, 1973). Fortunately, a number of other courts have invalidated or questioned existing obscenity statutes because they failed to specify the kinds of sexual conduct which could be considered patently offensive. See, *e.g.*, *Literature Inc.* v. *Quinn*, 482 F.2d 372 (1st Cir. 1973); *Hamar Theatres Inc.* v. *Cryan*, 365 F. Supp. 1312 (D. N.J. 1973) (three-judge court), *juris. statement filed*, 42 U.S. Law Week 3365 (Dec. 18, 1973); *Detco Inc.* v. *McCann*, 365 F. Supp. 176 (E.D. Wisc. 1973); *United States* v. *Lang*, 361 F. Supp. 380 (C.D. Cal. 1973); *Stroud* v. *Indiana*, —— Ind. ——, 13 Cr. L. Rep. 2541 (1973); *Louisiana* v. *Shreveport News Agency, Inc.*, —— La. ——, 42 Law Week 2344 (1973). While this Court has implied that it is "prepared" to authoritatively construe Section 1461 as incorporating the *Miller* standards, see *United States* v. *12 200-Foot Reels*, 413 U.S. 123, 130, n.7 (1973), there are limits to the liberty which this Court or any other can take with statutory language or purpose. See, *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515-17 (1964); *Baggett*

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depiction would be prohibitable might be specified with some definiteness, other elements of the new *Miller* test of obscenity remain vague. Under *Miller*, First Amendment rights are made to turn on whether a given work dealing with sexual matters has "serious literary, artistic, political, or scientific value." The "serious value" standard is as uncertain as it is unprecedented.

v. *Bullitt*, 377 U.S. 360 (1964); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 153-54 (1969); *Welsh* v. *United States*, 398 U.S. 333, 354 (1970) (concurring opinion of Justice Harlan); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970). The federal statute has been on the books for a century without ever specifying the kind of sexual conduct to which regulation of obscenity must be limited. More than an *ipse dixit* is required to find that this statute embodies such specifications.

Finally, even if the statute can be construed to embody the *Miller* requirements, until this Court explicitly does so, retroactive application of such requirements is impermissible. The decisions last June significantly altered the Court's obscenity doctrines and definitions. To meet the dissenters' contention that concepts in this area could never be stated with the requisite precision, the Court held that obscenity statutes, as written or construed, would have to identify the sexual conduct being regulated. Section 1461 never met these requirements and does not meet them even today. Prospectively construing the statute to comply with *Miller* is questionable enough; retroactively applying that construction to these petitioners is unconstitutional. See *Bouie* v. *Columbia*, 378 U.S. 347 (1964); *Ginzburg* v. *United States*, 383 U.S. 463, 495 (1966) (dissenting opinion of Justice Harlan); *United States* v. *Lang*, *supra*. Such a result embodies all the evils of an *ex post facto* enactment.

CONCLUSION

For the reasons set forth herein, the decision below should be reversed.

Respectfully submitted,

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